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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The public revelation of a federal grand jury investigation into business conduct routinely triggers follow-on class actions, and the grand jury investigation and ensuing civil actions often proceed concurrently. In the civil actions, district judges frequently issue protective orders to secure important interests, such as the confidentiality of competitively sensitive business information disclosed in discovery. When federal prosecutors serve grand jury subpoenas for such protected discovery materials, the courts must decide whether the grand jury subpoena overrides the civil protective order.

Here, the Ninth Circuit applied that circuit's "*per se* rule" that a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations such as the territorial limitations on a grand jury's subpoena power. In stark contrast to the Ninth Circuit's "*per se* rule," the governing rule in the Second Circuit presumes that a civil protective order trumps a grand jury subpoena, absent certain exceptional circumstances. These irreconcilable rules bookend an express, three-way conflict among six circuits on this important question of federal practice. The question presented is as follows:

Whether a grand jury subpoena always trumps a civil protective order, thus allowing prosecutors to obtain discovery materials from a parallel civil action, regardless of any countervailing considerations.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is the subject of this petition are as follows:

Petitioner in this Court, appellee below, is White & Case LLP. Additional appellees below who are not parties to this petition include Nossaman LLP and K&L Gates LLP.

Respondent in this Court, appellant below, is the United States of America.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner states as follows:

White & Case LLP, a law firm, has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Toshiba Corporation ("Toshiba"), Toshiba Mobile Display Co., Ltd. ("TMD") (f/k/a Toshiba Matsushita Display Technology Co., Ltd.), Toshiba America Electronic Components, Inc. ("TAEC"), and Toshiba America Information Systems, Inc. ("TAIS"), the real parties in interest, hereby state as follows: Toshiba has no parent company, and no publicly held corporation owns 10 percent or more of its stock. TMD is a wholly-owned subsidiary of Toshiba. TAEC and TAIS are wholly-owned subsidiaries of Toshiba America, Inc., which is a holding company wholly owned by Toshiba.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner White & Case LLP respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 627 F.3d 1143 (9th Cir. 2010). The order of the court of appeals issuing the mandate (Sealed App. 1) is not reported.

The opinion of the district court quashing the grand jury subpoenas (Sealed App. 2) was filed under seal and is not reported.

The district court issued an unsealed "Statement of Reasoning" explaining its decision quashing the grand jury subpoenas (App. 4a). The Statement of Reasoning is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 26(c)(1) of the Federal Rules of Civil Procedure provides in relevant part:

> A party or any person from whom discovery is sought may move for a protective order . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue

> burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way . . . .

Rule 17(c)(2) of the Federal Rules of Criminal Procedure provides: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

STATEMENT OF THE CASE

This petition concerns a recurring issue of critical importance: whether a grand jury subpoena trumps a civil protective order regardless of any countervailing considerations, thus permitting federal prosecutors to obtain discovery produced in a parallel civil action under all circumstances. The courts of appeals are divided on this issue.

1. Rule 26(c)(1) of the Federal Rules of Civil Procedure provides district courts with broad

discretion, upon a finding of good cause, to enter protective orders limiting the timing, use and dissemination of discovery. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."). Protective orders serve various important functions, including preserving the confidentiality of trade secrets or sensitive commercial information. Fed. R. Civ. P. 26(c)(1)(G). Protective orders are essential in "secur[ing] the just, speedy, and inexpensive determination" of civil actions by encouraging full disclosure of relevant evidence. *See* Fed. R. Civ. P. 1. For example, in *Seattle Times*, this Court held that a protective order was enforceable and consistent with the First Amendment, even though the protective order restricted the press's ability to use the fruits of pretrial civil discovery. 467 U.S. at 37 (1984).

The discretion of district courts to enter protective orders is necessary because civil discovery under the Federal Rules is exceptionally broad. *See id.* at 34 ("Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."). Discovery in antitrust cases, for example, is infamously intrusive. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting the "enormous expense of discovery in" antitrust cases) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

2. "The grand jury occupies a unique role in our criminal justice system. . . . As a necessary consequence of its investigatory function, the grand

jury paints with a broad brush." *United States v. R. Enters.*, 498 U.S. 292, 297 (1991). "The investigatory powers of the grand jury are nevertheless not unlimited." *Id.* at 299. Rule 17(c)(2) of the Federal Rules of Criminal Procedure vests district judges with discretion to determine the enforceability of grand jury subpoenas: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

Addressing this standard under Rule 17(c)(2), this Court held in *R. Enterprises*: "This standard is not self-explanatory. As we have observed, what is reasonable depends on the context." 498 U.S. at 299 (1991) (citation and internal quotation marks omitted). Thus, this Court has confirmed what the text of Rule 17(c)(2) naturally suggests: a motion to quash under Rule 17(c)(2) requires a fact-intensive, circumstantial inquiry by the district judge.

3. In December 2006, news reports revealed a criminal grand jury investigation being conducted by the United States Department of Justice, Antitrust Division ("DOJ"), into the thin-film transistor, liquid crystal display ("TFT-LCD") industry. App. 2a. As is typical upon the revelation of a grand jury investigation into antitrust, securities and other business conduct, the class-action bar filed dozens of putative class actions within a matter of days. App. 2a. Eventually, close to 140 such putative class action complaints (the "Class Actions") were filed around the country, seeking treble damages, attorneys' fees and injunctive relief under the Clayton Act. 15 U.S.C. §§ 15, 26 (2011).

As the district court observed: "It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation . . . ." App. 8a; *see also* Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 58 (Summer 2010) (in a survey of 1,811 antitrust class actions filed between January 1, 2007 and December 31, 2009, nearly 60% arose from prior government enforcement action). Indeed, here DOJ conceded that its grand jury investigation caused the Class Actions. *See* United States' Notice of Mot. and Mot. to Modify the Court's Sept. 25, 2007 Order Granting United States' Mot. to Stay Discovery at 6-7, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. May 18, 2009) (ECF No. 990).

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation transferred the Class Actions to the United States District Court for the Northern District of California for coordinated pretrial proceedings. Not coincidentally, the Class Actions were transferred to the same district in which the grand jury investigating the TFT-LCD industry also sits. *See* Plaintiffs' Mot. for Transfer and Consolidation of Related Antitrust Actions to the Northern District of California Pursuant to 28 U.S.C. § 1407 at 10, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 1827 (J.P.M.L. Dec. 22, 2006) (ECF No. 1) ("This Panel often gives deference to the forum where related grand jury proceedings and governmental investigations are pending.") (citations omitted). Indeed, the district judge below, the Honorable Susan Y. Illston, presides over not only the Class Actions, but also the various criminal

proceedings against TFT-LCD manufacturers. Judge Illston also granted the motions to quash that gave rise to this petition.

Plaintiffs in the Class Actions named as Defendants a number of foreign corporations, including certain Toshiba entities represented by White & Case. Personal jurisdiction over these foreign parties in the Class Actions was perfected by service of process under the Hague Convention on service of civil process abroad. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (the "Hague Convention"); Certificate of Service, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2008) (ECF No. 453-7) (certification that class action complaint was properly served under the Hague Convention on a Toshiba entity in Japan).

The Toshiba entities have steadfastly denied any wrongdoing and have not been indicted by the grand jury, which has investigated the industry for over four years; other industry participants have pleaded guilty to antitrust offenses or have been indicted and are awaiting trial.

Notably, early on in the Class Actions DOJ intervened, seeking to influence the civil discovery based on DOJ's priorities for the parallel grand jury investigation. In particular, DOJ made two arguments seeking to stay discovery in the Class Actions. App. 5a. First, DOJ argued that "because civil discovery is broader than criminal discovery, there was the risk that parties in the civil action

would be able to discover sensitive information about the grand jury investigation through civil discovery," thereby interfering with the criminal investigation. App. 5a.

Second, DOJ argued:

> [I]f civil discovery proceeded in tandem with the grand jury proceedings, employees of the companies under investigation could be placed in the *untenable position* of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter.

App. 5a (emphasis added). Thus, in addition to recognizing the broader reach of civil discovery, DOJ acknowledged the significant risks facing parties involved in both the grand jury investigation and the concurrent Class Actions.

Judge Illston granted DOJ's motion and entered an order staying most discovery and permitting DOJ to "review but not copy" the limited class-certification discovery that was allowed to proceed while the stay was in place. App. 5a. While the "review" mechanism addressed DOJ's concerns that civil discovery could interfere with the grand jury investigation, the stay order prohibited DOJ from copying civil discovery for use as evidence in the grand jury investigation.

In addition, to protect and limit the use of civil discovery, Judge Illston entered a protective order upon a finding of good cause:

> Disclosure and discovery activity in this action may involve production of trade secrets or other confidential research, development, or commercial information, within the meaning of Fed. R. Civ. P. 26(c); or other private or competitively sensitive information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted.

In re TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-1827 SI, at 1 (N.D. Cal. Dec. 10, 2007) (ECF No. 421) (Protective Order).

4. More than two years after the grand jury investigation became public, DOJ approached the parties in the Class Actions and requested copies of all civil discovery, including foreign documents and deposition testimony originating outside the United States that would otherwise lie outside the grand jury's subpoena power. When certain parties declined, DOJ demanded the entire civil discovery record (including documents produced in the future) by seeking a modification of the discovery stay order. The Toshiba entities objected, and the Honorable Fern M. Smith, a former United States District Judge sitting as Special Master in the Class Actions, issued a Report and Recommendation prohibiting DOJ from copying the foreign documents and deposition transcripts of Defendants in the Class Actions who

had not been indicted by the grand jury. App. 14a-15a. The Special Master's Report and Recommendation also prohibited DOJ from presenting any such materials to the grand jury. App. 14a. Judge Illston adopted the Special Master's Report and Recommendation. App. 9a-10a.

In these decisions, the Special Master and Judge Illston acknowledged that "[i]t is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings." App. 13a. *See also* Joel I. Klein, Assistant Attorney Gen., Antitrust Division, Statement Before the Subcommittee on Antitrust, Business Rights and Competition of the Senate Committee on the Judiciary Concerning International Antitrust Enforcement at 8 (May 4, 1999), *available at* http://justice.gov/atr/public/testimony/2413.pdf. ("The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad—out of the reach of U.S. subpoena power and search and seizure authority.").

For these reasons, when DOJ serves grand jury subpoenas, its practice is to seek foreign documents solely on a voluntary basis, a practice that initially was followed in this case: "The Division's normal procedure is to accompany subpoenas that may encompass foreign-located documents with a note to the effect that production of foreign materials should be considered voluntary unless and until the subpoena recipient is otherwise notified by the Division." ABA, Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations* 293 (3d ed. 2002) ("*Grand Jury Handbook*").

In light of these limitations on the grand jury's subpoena power, several methods have become established over time as the primary means by which federal prosecutors may request foreign discovery for a criminal investigation: (i) letters rogatory; (ii) treaties, including mutual legal assistance treaties ("MLATs"); and (iii) informal diplomatic requests. App. 7a. These established methods are set forth in DOJ's own manuals and are specifically designed to respect the rights of foreign sovereigns and foster international comity. *See* United States Department of Justice, *Criminal Resource Manual* §§ 267, 274-78, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm. ("Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty.").

For example, the legal basis for letters rogatory is the principle of international comity: "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." *Grand Jury Handbook* at 281. As DOJ acknowledges: "Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds." United States

Department of Justice, Antitrust Division, *Grand Jury Manual* III-11 (1991) ("*Grand Jury Manual*"), *available at* http://www.justice.gov/atr/public/guidelines/206696.pdf.

Furthermore, the Special Master and Judge Illston emphasized in these decisions that the Toshiba entities brought the foreign discovery into the United States solely because they were compelled to do so in the civil discovery that ensued from the grand jury investigation. App. 6a, 12a-13a.

The Special Master and Judge Illston also cautioned that "defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safe-guarded, so that the government does not overstep its power, intentionally or otherwise." App. 13a. At the same time, the Special Master and Judge Illston balanced the interests of civil Plaintiffs in a prompt resolution of their claims, rather than imposing an indefinite stay of the Class Actions. Thus, these decisions preserved the "review but not copy" framework and ordered the Toshiba entities to produce immediately the foreign discovery to civil Plaintiffs in the United States. The district court did not, however, purport to address the possibility of grand jury subpoenas for the foreign-origin discovery, saying "[i]f and when the DOJ seeks to enforce existing subpoenas, or issues new subpoenas seeking the foreign documents, the matter will then be ripe for decision." App. 10a.

5. DOJ subsequently served grand jury subpoenas on four law firms representing parties involved in the Class Actions, including White & Case LLP as counsel for the Toshiba entities. The

grand jury subpoenas sought the foreign-origin documents and deposition transcripts from the Class Actions. After White & Case moved to quash the subpoenas under Rule 17(c)(2) of the Federal Rules of Criminal Procedure, DOJ filed a motion requesting that Judge Illston be assigned to the motions to quash, which were then transferred to her. The district court had jurisdiction under 18 U.S.C. § 3231 and Rule 17(c).

After full briefing and a hearing, Judge Illston quashed the grand jury subpoenas, reiterating that "the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits." App. 6a. Judge Illston also noted that the foreign-origin documents and deposition transcripts were present in the United States solely because of compelled civil discovery in the Class Actions that had followed the revelation of DOJ's grand jury investigation, and in order to obtain such materials, DOJ would normally be required to utilize one of the established methods, such as letters rogatory. App. 7a; Sealed App. 4-5.

Judge Illston also recognized the significant risks to parties involved in criminal investigations with follow-on civil litigation, as well as DOJ's role in causing the Class Actions here through the pursuit and eventual public revelation of its grand jury investigation. App. 8a; Sealed App. 6.

Additionally, Judge Illston found that there was no Ninth Circuit precedent controlling the matter: "While there is broad language in *Meserve* regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign

evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted foreign defendants." App. 7a-8a (citing *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)).

6. The Ninth Circuit reversed, holding that Judge Illston had abused her discretion. App. 2a. Contrary to the fact-intensive, circumstantial inquiry required by Rule 17(c)(2) of the Federal Rules of Criminal Procedure, the court of appeals summarily applied the *per se* rule from its *Meserve* precedent without consideration of any countervailing circumstances: "we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a (citation omitted).

The Ninth Circuit issued its mandate on December 22, 2010, and the Toshiba entities subsequently agreed to the production of all of their civil discovery to DOJ, subject to the outcome of this petition. Sealed App. 1. The Ninth Circuit's ruling remains of vital and continuing importance because the Class Actions, with ongoing civil discovery, and the grand jury investigation are both live and active. Documents and deposition testimony not yet in the United States or within DOJ's possession are subject to the Ninth Circuit's decision. In addition, DOJ assured the court below that DOJ would return all of the discovery at issue if this Court were to reverse the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

This case squarely presents a recurring and important question of federal practice on which six circuits have conflicted in reaching an intractable three-way split: namely, the correct legal standard for resolving the collision between federal grand jury subpoenas and civil protective orders. In this case, the Ninth Circuit applied its "*per se* rule" that grand jury subpoenas always trump civil protective orders, reversing the district court's order that had quashed the grand jury subpoenas in favor of the protective order previously entered by the district court. The Fourth and Eleventh Circuits follow the same *per se* rule as the Ninth Circuit.

In contrast, the Second Circuit follows virtually the opposite rule that civil protective orders are presumed to trump grand jury subpoenas absent extraordinary circumstances or compelling need by the government. Indeed, the Ninth Circuit case first adopting the *per se* rule discussed the Second Circuit's rule at length and expressly declined to follow it. It is apparent that this case would have had the opposite outcome in the Second Circuit (i.e., affirmance of the district court's order quashing the grand jury subpoenas) because DOJ undisputedly did *not* exhaust, or even pursue, other means to obtain the materials constituting the discovery in the parallel civil actions prior to issuing the grand jury subpoenas.

Furthermore, the First and Third Circuits have analyzed the irreconcilable conflict between the *per se* circuits and the Second Circuit, and have

established yet a third position, which presumes that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances. Notably, in carving out this intermediate position, both the First and Third Circuits expressly declined to follow the *per se* rule due to its inflexibility. Thus, six courts of appeals have reached an open, three-way circuit split, which is ripe for resolution by this Court.

This case demonstrates how important this issue has become, particularly in high-stakes business matters subject to grand jury investigation and parallel (usually follow-on) civil litigation. For example, as both DOJ and the district court acknowledged in this case, a civil deponent's ability to rely on a protective order in the face of a looming grand jury investigation is pivotal: when courts honor protective orders, a defendant may testify to defend himself in the civil action; otherwise, the defendant may feel compelled to assert the Fifth Amendment privilege against self-incrimination and risk potentially ruinous adverse inferences for purposes of civil liability.

The conflicting positions of the courts of appeals present a similar quandary concerning a civil defendant's determination whether to produce documents from outside the United States that would otherwise lie beyond the grand jury's territorial subpoena authority: if courts respect protective orders, a defendant can produce documents and seek a just resolution of the civil case on the merits without fear of the government using these documents in a criminal case; otherwise, the civil

defendant may forgo production and become exposed to harsh consequences including possible default.

As a result of these divergent rules of law, the collision between a grand jury subpoena and a civil protective order will be resolved in vastly different ways depending on the jurisdiction. These inconsistencies in the application of the Federal Rules of Criminal and Civil Procedure encourage forum shopping.

The Ninth Circuit's decision below exacerbates the circuit conflict by bringing into sharp focus the implications of the *per se* rule. Indeed, the district court here distinguished the Ninth Circuit's *per se* rule precisely because a mechanical priority for grand jury subpoenas over civil protective orders would enable the government to obtain materials beyond the reach of its grand jury subpoena power. That distinction was dismissed when the Ninth Circuit held that its *per se* rule gives precedence to grand jury subpoenas in all circumstances.

I. THE INTERPLAY OF GRAND JURY SUBPOENAS AND CIVIL PROTECTIVE ORDERS HAS LED TO AN EXPRESS, THREE-WAY CONFLICT AMONG SIX CIRCUITS.

A. The *Per Se* Rule Prioritizing Grand Jury Subpoenas Over Civil Protective Orders

In the decision below, the Ninth Circuit stated that "the district court abused its discretion" in granting Petitioners' motion to quash DOJ's grand jury subpoenas in favor of the district court's previously entered protective order. App. 2a. Despite the district court's detailed consideration of

the circumstances concerning the parallel grand jury investigation and class-action cases—including the extraterritorial civil discovery materials produced in reliance on the court's protective order and otherwise outside DOJ's grand jury subpoena power—the Ninth Circuit bluntly held: "we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a (citing *In re Grand Jury Subpoenas Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir. 1995)).

Thus, notwithstanding the Ninth Circuit's statement that the district court "abused" its discretion, in truth, the Ninth Circuit concluded that a district court does not have discretion to quash a grand jury subpoena in favor of a civil protective order—even where the very same district judge who entered the protective order for good cause was considering whether compliance with the subpoena would be "unreasonable or oppressive" under Rule 17(c)(2) of the Federal Rules of Criminal Procedure.

The Ninth Circuit first adopted its *per se* rule in the *Meserve* decision that was relied upon by the Ninth Circuit here. *Meserve* itself expressly discussed the then two-way circuit conflict between (i) the Second Circuit rule that prioritizes civil protective orders over grand jury subpoenas absent extraordinary circumstances or compelling need by the government, and (ii) the Fourth and Eleventh Circuits' *per se* rule that prioritizes grand jury subpoenas over civil protective orders in all circumstances. *Meserve*, 62 F.3d at 1223-26 (9th Cir. 1995) (citing, *inter alia*, *In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221 (2d

Cir. 1991); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) (divided panel); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013 (11th Cir. 1993)).

The Ninth Circuit proceeded in *Meserve* to reject unequivocally the Second Circuit position and adopt the *per se* rule that was dispositive in the outcome of this case. *Meserve*, 62 F.3d at 1226 (9th Cir. 1995) ("We adopt the *per se* rule of the Fourth and Eleventh Circuits."). When adopting the *per se* rule, the Ninth Circuit never reconciled the rigidity of that approach with the discretion conferred on district judges by Criminal Rule 17(c)(2), or the discretion likewise underlying a district judge's prior entry of a protective order under Civil Rule 26(c). Nor did the Ninth Circuit contemplate any other circumstances where a district judge might quash grand jury subpoenas in favor of a protective order, such as here where the civil discovery included materials outside the grand jury's territorial subpoena power.

B. The Second Circuit Rule Prioritizing Civil Protective Orders Over Grand Jury Subpoenas

The Second Circuit follows virtually the opposite rule from the *per se* circuits: "absent a showing of improvidence in the grant of a protective order or some extraordinary circumstance or compelling need, *a protective order is enforceable against any third party, including the government.*" *Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1224 (2d Cir. 1991) (citing *Martindell v. Int'l*

Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979)) (emphasis added).

Indeed, the Second Circuit's decision that first prioritized a civil protective order over a grand jury subpoena expressly declined to follow the *per se* rule that, at that time, had been adopted by a divided panel in the Fourth Circuit. *Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1225 (2d Cir. 1991) (holding that the court "respectfully decline[s] to follow the Fourth Circuit's apparent per se rule that a grand jury subpoena will always be enforced despite the existence of an otherwise valid protective order").

In rejecting the *per se* rule, the Second Circuit reasoned: "the government already has 'awesome powers' such as subpoenaing a witness to testify before a grand jury, which 'render unnecessary its exploitation of the fruits of private litigation.'" *Id.* at 1224 (quoting *Martindell*, 594 F.2d at 296 (2d Cir. 1979)). The Second Circuit also emphasized the important role protective orders play in promoting the full disclosure necessary for the efficient resolution of civil disputes, *id.*, as well as the strong reliance interest on protective orders that naturally follows: "In this case, there is a protective order. We see no reason on the record before us not to presume, as we have in the past, that a witness relied on it," *id.* at 1225 (citing *Minpeco S.A. v. ContiCommodity Servs., Inc.*, 832 F.2d 739, 743 (2d Cir. 1987)).

Thus, the Second Circuit openly created the initial circuit conflict on the issue presented here. And the Second Circuit's steadfast prioritization of civil

protective orders over grand jury subpoenas remains settled practice there today. *E.g.*, John Gleeson (U.S. District Judge, E.D.N.Y.), et al., *Federal Criminal Practice: A Second Circuit Handbook* § 45-6 (2010) (acknowledging circuit conflict, then stating: "In the Second Circuit, to gain access to civil discovery covered by a protective order, the government must demonstrate either 'improvidence' in granting the protective order 'or some extraordinary circumstance or compelling need.'") (quoting *Martindell*, 594 F.2d at 296 (2d Cir. 1979)). Notably, the Second Circuit's rule is frequently associated with that circuit's seminal *Martindell* decision on which the Second Circuit's 1991 decision relied, but the 1991 decision was the first in that circuit to prioritize a civil protective order in the precise context of a collision with a grand jury subpoena.

Recently, the Tenth Circuit indicated that it may be headed toward the Second Circuit rule when the Tenth Circuit followed *Martindell* to reverse a district court's modification of a civil protective order that provided IRS criminal investigators access to documents produced in reliance on the protective order. *SEC v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1272-73 (10th Cir. 2010) (relying on *Martindell*, 594 F.2d at 295 (2d Cir. 1979)).

Because it is undisputed here that DOJ failed to pursue any alternative means to acquire the materials constituting the civil discovery (App. 7a-8a), there can be no serious question that this case would have had the opposite outcome in the Second Circuit.

C. A Third Approach: The Rebuttable Presumption in Favor of Grand Jury Subpoenas

The First and Third Circuits have recognized the conflict between the *per se* circuits and the Second Circuit and have taken yet another position that presumes that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances. *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir. 1998) ("Regarding both the *Martindell* rule and the per se rule as flawed to some extent, we chart a different course. The proper approach, we think, is along the following lines: A grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order."); *In re Grand Jury*, 286 F.3d 153, 157-58 (3d Cir. 2002) ("We have not previously addressed whether, and under what circumstances, a civil protective order may shield information from a grand jury, but our sister circuits have developed three different approaches to this problem. . . . We join the First Circuit in concluding that a strong but rebuttable presumption in favor of a grand jury subpoena best accommodates the sweeping powers of the grand jury and the efficient resolution of civil litigation fostered by protective orders.").

In rejecting both the *per se* and Second Circuit approaches, the First and Third Circuits each articulated reasoning consistent with Criminal Rule

17(c)(2) and the fact-intensive, circumstantial inquiry undertaken by the district court here but rejected by the Ninth Circuit. *See Roach*, 138 F.3d at 445 (1st Cir. 1998) ("How this presumption in favor of a grand jury subpoena plays out in each individual case will depend upon the particular facts and circumstances. When called upon to adjudicate a motion to quash a grand jury subpoena in the face of a civil protective order, a district court may mull factors such as the government's need for the information *(including the availability of other sources)* . . . .") (emphasis added); *In re Grand Jury*, 286 F.3d at 162 (3d Cir. 2002) (adopting First Circuit factors, the first of which being "the government's need for the information (including the availability of other sources)").

Furthermore, the First and Third Circuits identified a "vice" in the *per se* rule—its complete lack of flexibility to consider important case-specific circumstances that could tip the balance in favor of enforcing a protective order against a grand jury subpoena:

> [The per se rule] overlooks that the balance nonetheless is variable and that the confluence of the relevant interests —generally, those of society at large and of the parties who are seeking to keep a civil protective order inviolate— occasionally may militate in favor of blunting a grand jury's subpoena.

Roach, 138 F.3d at 445 (1st Cir. 1998), *quoted in In re Grand Jury*, 286 F.3d at 162 (3d Cir. 2002).

* * *

The express three-way circuit conflict on the issue presented in this case has been acknowledged in secondary authorities. *E.g.*, 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure: Criminal* § 276 (4th ed. 2010) ("The circuits differ on the rule to be applied when a grand jury subpoena seeks material covered by a protective order in a civil case," and noting the three approaches); ABA Section of Antitrust Law, *Antitrust Law Developments* 956 (6th ed. 2007) ("A split among several circuit courts exists, however, as to whether a grand jury subpoena takes precedence over a Rule 26(c) protective order.").

Nearly half of the nation's courts of appeals have weighed in with three intractable positions, demonstrating the recurring importance of the issue. The courts of appeals are at an impasse that requires resolution by this Court.

II. THE INTERPLAY OF GRAND JURY SUBPOENAS AND CIVIL PROTECTIVE ORDERS IS A PIVOTAL ISSUE, PARTICULARLY IN HIGH-STAKES BUSINESS CASES, AND REQUIRES A UNIFORM RULE TO PREVENT FORUM SHOPPING.

As the district court in this case observed: "It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation . . . ." App. 8a. Indeed, this case is one of many recent multi-district, class-action antitrust cases that have proceeded in parallel with related grand jury investigations:

(i) *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042 (E.D. Mich. filed June 9, 2009);

(ii) *In re Processed Egg Prods. Antitrust Litig.*, No. 2:08-md-02002 (E.D. Pa. filed Dec. 2, 2008);

(iii) *In re Mun. Derivatives Antitrust Litig.*, No. 1:08-md-01950 (S.D.N.Y. filed June 18, 2008);

(iv) *In re Graphics Processing Units Antitrust Litig.*, No. 3:07-md-01826 (N.D. Cal. filed Apr. 20, 2007);

(v) *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 1:06-md-01775 (E.D.N.Y. filed June 27, 2006); and

(vi) *In re Hydrogen Peroxide Antitrust Litig.*, No. 2:05-md-01682 (E.D. Pa. filed June 17, 2005).

This dynamic of concurrent class-action cases and grand jury investigations is not limited to antitrust cases. Other examples include:

(i) ***securities cases***: *In re Wash. Mutual, Inc. Sec. Litig.*, No. 2:08-md-1919 (W.D. Wash. filed Feb. 21, 2008) (securities class action concurrent with grand jury investigation of same conduct); *Caiafa v. Comverse Tech., Inc.*, No. 1:06-cv-01825 (E.D.N.Y. filed Apr. 19, 2006), *and United States v. Alexander*, No. 06-cr-00628 (E.D.N.Y. filed Sept. 20, 2006) (indictment for conduct at issue in *Caiafa* class action); *In re Broadcom Corp. Derivative Litig.*, 2:06-cv-03252 (C.D. Cal. filed

May 25, 2006), *and United States v. Nicholas*, 8:08-cr-00139 (C.D. Cal. filed June 4, 2008) (indictment for conduct at issue in *Broadcom* class action); *Newby v. Enron Corp.*, 4:01-cv-03624 (S.D. Tex. filed Oct. 22, 2001), *and United States v. Causey*, No. 4:04-cr-00025 (S.D. Tex. filed Jan. 21, 2004) (indictment for conduct at issue in *Enron* class action);

(ii) ***product liability cases***: Toyota Motor Corp., Annual Report (Form 20-F), at 46-47 (June 25, 2010) (disclosing the existence of grand jury investigation and 200 related putative class actions concerning alleged unintended acceleration defects), *available at* http://sec.gov/Archives/edgar/data/1094517/000119312510146673/d20f.htm; *In re Pet Food Prods. Liab. Litig.*, No. 1:07-cv-02867 (D.N.J. filed June 20, 2007) (class action related to adulterated food product concurrent with grand jury investigation of same conduct); and

(iii) ***Foreign Corrupt Practices Act cases***: *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 4:09-cv-04032 (S.D. Tex. filed Dec. 18, 2009) (civil action alleging bribery by a Japanese corporation concurrent with criminal investigation of same conduct); *In re Willbros Group, Inc. Sec. Litig.*, No. 05-cv-1778 (S.D. Tex. filed May. 18, 2005), *and United States v. Steph*, No. 4:07-cr-00307 (S.D. Tex. filed July 19, 2007) (criminal indictment for conduct at issue in *Willbros* class action).

In all of these cases, and the scores of others like them, the interplay of grand jury subpoenas and civil

protective orders is a crucial issue that may fundamentally affect the course and outcome of the parallel criminal and civil matters. For example, a civil deponent who can rely on a protective order to maintain the confidentiality of his testimony is in an entirely different position from the deponent who must choose between potential self-incrimination and the potentially ruinous adverse inferences that can follow from an assertion of the Fifth Amendment. *Compare, e.g., In re Grand Jury*, 286 F.3d at 161 (3d Cir. 2002) ("deponents who have reason to fear not just embarrassment or economic disadvantage, but possible criminal charges as well, should be aware that a protective order alone cannot protect them from a grand jury investigation"), *with Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d at 1225 (2d Cir. 1991) ("we have upheld the use of protective orders limiting disclosure of potentially incriminating testimony where parties have *voluntarily* consented to testify in civil cases in reliance upon such protective orders") (citation and internal quotation marks omitted) (emphasis in original). The differing circuit rules create inequitable results for defendants in different locations.

Similarly, in the context of document discovery, defendants in certain circuits may be forced to risk sanctions or default in civil cases to fully assert their criminal defense rights, while defendants in other circuits can avoid such problems. Such divergent outcomes in different circuits are not in the interests of justice. Discouraging compliance with discovery

requests reduces the likelihood that civil cases will be decided fairly.

The *per se* rule necessarily leads to another troubling distortion of civil litigation: class action plaintiffs in the *per se* circuits will know that overly broad discovery requests will expose defendants to greater risks in a parallel criminal investigation, thereby multiplying plaintiffs' leverage in the civil action. This is exactly the type of "*in terrorem* increment of the settlement value" that this Court recognized as problematic in *Twombly*, 550 U.S. at 558 (2007) (citation and internal quotation marks omitted). As this Court has observed, such collateral consequences of broad civil discovery can cause defendants "to settle even anemic cases." *Id.* at 559.

The unavoidable byproduct of this lack of uniformity is a perhaps irresistible temptation for plaintiffs and prosecutors to forum shop. The *per se* jurisdictions are the most desirable for plaintiffs and prosecutors alike. But "[o]ne of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts . . . ." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation and internal quotation marks omitted).

For example, all other things being equal, why would a prosecutor not choose a forum where the government could assuredly commandeer all civil discovery, including foreign materials otherwise beyond the government's subpoena power, versus a forum lacking that potentially decisive advantage? Notably, the DOJ Antitrust Division's own manual gives prosecutors broad discretion in deciding where

to empanel grand juries, and the relevant considerations include the "potential difficulties in conducting grand juries in particular jurisdictions." United States Department of Justice, Antitrust Division, *Antitrust Division Manual* III-88 (4th ed. 2008), *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf. Thus, particularly in cases of national importance, DOJ can choose among the *per se* circuits, the intermediate circuits or the Second Circuit. Indeed, it appears that DOJ could choose to have a grand jury subpoena issue from a *per se* forum to defeat a protective order entered elsewhere, as any motion to quash the subpoena would be heard in the district court where the subpoena issued. *See* Fed. R. Crim. P. 17(c)(2); *United States v. (Under Seal)*, 714 F.2d 347, 350 (4th Cir. 1983) ("The power to quash a subpoena exists in the district court of the district where the grand jury sits by reason of its inherent authority to prevent misuse of its own process.").

Similarly, civil plaintiffs will seek to file in *per se* jurisdictions to maximize their leverage over defendants by unquestionably rendering any civil discovery subject to grand jury subpoena, which may raise the risk of default.

For these reasons, this fully developed conflict among six circuits on a pivotal issue for so many important business cases is an exceedingly worthy candidate for this Court's attention and resolution.

III. THE NINTH CIRCUIT'S DECISION EXACERBATES THE CIRCUIT CONFLICT BY ENABLING FEDERAL PROSECUTORS TO CIRCUMVENT TERRITORIAL LIMITATIONS ON GRAND JURY SUBPOENA AUTHORITY.

A. The Ninth Circuit's decision in this case exacerbates the circuit conflict by enabling DOJ, apparently for the first time in a reported case, to circumvent the U.S. territorial limitations on grand jury subpoena authority. Before the district court and the Ninth Circuit, DOJ disputed that it was extending its jurisdictional reach or offending foreign sovereignty, arguing that it was seeking civil discovery that had been brought into the United States and thus within DOJ's jurisdictional reach. This argument failed to account for three important circumstances: (i) there is no dispute that the foreign documents in question were generated and maintained entirely overseas in the normal course of business; (ii) DOJ never attempted to obtain these documents through letters rogatory, an MLAT or diplomatic channels; and (iii) DOJ sought to exploit civil discovery to obtain what DOJ could not obtain directly by grand jury subpoena.

The district court here appreciated these special circumstances and rejected DOJ's argument that subpoenaing the civil discovery would not circumvent the territorial limitations on grand jury subpoena power. Indeed, the district court distinguished the Ninth Circuit's *per se* rule precisely to avoid that outcome:

> While there is broad language in *Meserve* [i.e., the Ninth Circuit precedent adopting the *per se* rule] regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted foreign defendants. It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery.

App. 7a-8a.

The district court also noted that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power." App. 6a (citations and internal quotation marks omitted) (emphasis in original).

The Ninth Circuit, however, held that these important circumstantial issues were irrelevant under the inflexible *per se* rule. That holding, which would *not* have followed in either the Second Circuit or the circuits following the intermediate rule, has

serious implications under the foreign-sovereignty and international-comity principles that dictate the limitations on the government's extraterritorial subpoena power in the first place. *See Grand Jury Manual* III-11 ("Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty.").

In the Ninth Circuit and the other *per se* circuits (Fourth and Eleventh), prosecutors can now sidestep the settled international methods for obtaining evidence from abroad—letters rogatory, MLATs and diplomatic channels—in favor of a grand jury subpoena for the entire discovery record from a parallel civil action. This significant departure from settled practice is not one of form over substance because the internationally accepted methods for obtaining foreign evidence require not only notice to the applicable foreign sovereign, but a substantive determination by that sovereign as to whether the materials should be produced: "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." *Grand Jury Handbook* at 281.

Because the *per se* circuits' interpretation of the Federal Rules of Criminal and Civil Procedure enables DOJ to circumvent internationally accepted methods for a sovereign's request for evidence—including another sovereign's right to refuse—that interpretation should be avoided under the

"prescriptive comity" rule of construction. *See, e.g., F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.").

Furthermore, this circumvention of the settled international methods for governments to obtain evidence is particularly problematic in areas where the applicable foreign sovereign does not share the enforcement or regulatory views of the United States. *See* Restatement (Third) of Foreign Relations Law of the United States § 442 reporter's n.1 (1987) ("To a considerable extent, the hostility to United States discovery practice reflects dislike of aspects of substantive American law, notably United States antitrust law and laws providing for regulation of international shipping.").

DOJ's circumvention of established methods is all the more troubling because DOJ exploited civil jurisdictional devices never intended to be used in the criminal context to further its grand jury investigation. The Hague Convention "is a multilateral treaty . . . . [that] provide[s] a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988). The Hague Convention, however, expressly applies only in civil cases. *See id.* at 699 (noting that Article 1, which states that the "Convention shall

apply in all cases, in civil or commercial matters," defines the scope of the convention).

Here, in the Class Actions, the district court perfected specific personal jurisdiction over the Toshiba entities from Japan through the Hague Convention. Thus, by taking the Toshiba entities' civil discovery for the grand jury investigation, DOJ exploited civil jurisdictional and discovery rules, neither of which were ever intended to be used in the criminal context. Under the *per se* rule, courts apparently do not have the discretion to remedy this untoward result.

DOJ's disregard of sovereignty, comity and due process inevitably provokes concern about reciprocal treatment of U.S. natural and legal persons, among other reverberations. *Cf., e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 12, Goodyear Luxembourg Tires, S.A. v. Brown, (No. 10-76) (U.S. filed Nov. 19, 2010) ("Decisions like the one at issue here may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade. Conversely, a United States corporation concerned about facing a similar rule abroad might be equally dissuaded from exporting its products."); United States Department of State, *Enforcement of Judgments* (emphasizing that the United States has failed to conclude a bilateral treaty or multilateral convention with "any other country on reciprocal recognition and enforcement of judgments[,]" largely because "foreign countries have objected to the extraterritorial jurisdiction asserted by courts in the United

States."), http://travel.state.gov/law/judicial/judicial_691.html (last visited Feb. 23, 2011).

B. The inability of the *per se* rule to prevent circumvention of the territorial limitations on DOJ's grand jury subpoena power has special implications in international cartel matters. The European Union and numerous individual countries on six continents have adopted antitrust regimes at least somewhat modeled on the antitrust amnesty program administered by DOJ in the United States: to destabilize cartels, the regulators provide some form of leniency to companies who self-report anticompetitive conduct. To further encourage such self-reports, the regulators almost always promise to maintain the confidentiality of the information submitted to them by a leniency applicant. Such self-reports sometimes occur in multiple jurisdictions around the world, and companies will also selectively self-report in some jurisdictions but not others.

In the United States, follow-on, class-action plaintiffs now routinely seek in discovery leniency applications or leniency statements that were submitted by civil defendants to foreign regulators. In the parallel Class Actions, for example, Plaintiffs currently are seeking such leniency applications that may have been submitted by other Defendants to the European Commission and the Japan Fair Trade Commission. The European Commission has appeared specially in the litigation to object to such discovery:

> The leniency program is the most effective tool at the Commission's

> disposal for the detection of cartels. Its success is crucially dependent on the willingness of companies to provide comprehensive and candid information. This willingness could disappear if potential leniency applicants would know that their corporate statements could become discoverable in civil litigation. The discoverability of corporate leniency statements in civil litigation could lead to the incongruous result that a cartel member that has chosen to cooperate with the Commission could wind up being in a worse position—with regard to civil claims—than those cartel members that have refused to cooperate.

Letter from the Director General of the Directorate General for Competition, European Commission, to the Hon. Susan Y. Illston at 6, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Feb. 15, 2011) (ECF No. 2450) ("EC Letter"). The Japan Fair Trade Commission has filed a similar objection that such disclosure would undermine the agency's leniency program. *See* Letter from the Director General of the Investigative Bureau, Japan Fair Trade Commission, to Hon. Susan Y. Illston, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-1827 SI (N.D. Cal. Feb. 3, 2011) (ECF No. 2392).

Notably, the European Commission expressly stated that it lacked the resources to intervene every time the issue arises: "it is not possible for the

Commission to intervene as amicus curiae in various jurisdictions around the world where disclosure of documents from its investigative file is often requested." EC Letter at 8. Thus, such non-U.S. regulators effectively must depend on civil defendants to raise and win such objections, but such defendants are not well-positioned to assert the sovereign rights and interests of foreign regulators and such materials have been produced in civil discovery—almost always subject to a protective order, however. *E.g., Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, No. 05-6042 (JBS), 2008 WL 4126602, at *8 (D.N.J. Aug. 27, 2008) (granting motion to compel documents referring and relating to EC decision against Defendant).

The *per se* rule gives U.S. prosecutors *carte blanche* to pierce protective orders to obtain such leniency materials produced in civil discovery that the prosecutors would not be able to obtain directly from foreign regulators (absent the consent of the self-reporting company). This outcome undermines these leniency programs for the reasons stated by the European Commission and Japan Fair Trade Commission—but for greater reason given the added dimension of U.S. criminal exposure. In other words, because of the *per se* rule, when a company applies to a foreign regulator for leniency, the leniency materials will be subject to grand jury subpoena by DOJ, thereby automatically exposing that company to U.S. criminal liability.

In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004), the United States, Belgium, Canada, Germany, Japan, the Netherlands,

and the United Kingdom participated as *amici curiae* on the merits arguing that this Court should consider the disincentive that U.S. civil liability for antitrust offenses unrelated to the United States would have on self-reporting. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioners at 20, *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) ("The court of appeals' interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability.").

The regulators' point in *Empagran* applies with greater force if leniency applicants must consider not only civil liability in the United States but exposure to U.S. criminal liability because U.S. district judges are not permitted the discretion to uphold protective orders on leniency materials produced in civil litigation.

* * *

The issue squarely presented by this petition has divided the courts of appeals. These inconsistent rules of law have led to unacceptable and unpredictable results for litigants who wish to defend civil cases on the merits in reliance on a protective order and who are served with grand jury subpoenas. These inconsistent results are particularly troubling for parties in complex business cases, where the scope of discovery is broad and the costs are enormous. The Ninth Circuit's decision also enables prosecutors to circumvent the territorial limitations on grand jury subpoena authority, with resulting

implications for foreign sovereignty and international comity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 25, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 10-15758

In re GRAND JURY SUBPOENAS, served on
White & Case LLP, Lieff, Cabraser,
Heinemann, Bernstein LLP,
K&L Gates LLP, and Nossaman LLP,
United States of America,
Appellant.

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted Nov. 3, 2010.
Filed Dec. 7, 2010.

Before: JOHN T. NOONAN and RICHARD A. PAEZ,
Circuit Judges, and KEVIN THOMAS DUFFY,
District Judge.*

James J. Fredricks, United States
Department of Justice, Washington, D.C.,
for appellant the United States.

Christopher M. Curran (argued), White & Case LLP,
Washington, DC, John H. Chung, White & Case LLP,
New York, NY, for White & Case LLP, et al.

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* The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

OPINION

NOONAN, Circuit Judge:

The United States appeals an order of the district court quashing certain subpoenas directed to the respondent law firms named in the caption of the case (the Law Firms). The subpoenas sought nonprivileged material in aid of a grand jury investigating the clients of the Law Firms. The material had been obtained by the firms as a result of civil discovery in an antitrust suit. Holding that the district court abused its discretion, we reverse its order.

BACKGROUND

In 2006, the United States was conducting an antitrust investigation into alleged criminal conduct. Soon after this investigation became public, a number of civil suits were filed by private plaintiffs against the companies under investigation. These suits were consolidated in the Northern District of California before District Judge Illston. The litigation resulted in the production by the civil defendants of documents originating outside the United States. The documents at issue here came into the possession of the Law Firms in the United States.

In this case the United States subpoenaed these documents. Invoking Federal Rule of Criminal Procedure 17, the Law Firms moved to quash. The district court stated that it found no authority governing the case. It concluded: "However, because the motions to quash raise novel issues with potentially far-reaching implications about the power of the grand jury and the relationship between grand jury proceedings and civil discovery of unindicted foreign defendants, the Court finds it is more prudent to quash the subpoe-

nas and allow the DOJ to raise these issues on appeal to the Ninth Circuit."

This appeal followed.

ANALYSIS

On appeal, the Law Firms argue that the district court exercised its discretion under Fed.R.Crim.Proc. 17 to quash the subpoenas and that the court of appeals should respect its reasonable exercise of discretion. We do not read the district court's decision as an exercise of discretion but as a passing of the decision to this court. We are not reviewing an exercise of discretion but a request for guidance.

[1] No collusion between the civil suitors and the government has been established or even suggested by the Law Firms. Indeed, the district court determined that the government had not engaged in any bad faith tactics. Moreover, the Law Firms do not claim that the documents are privileged. Accordingly, we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order. *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir.1995). By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury. *See* 18 U.S.C. § 3332.

[2] For this reason, the order of the district court is REVERSED. The subpoenas may be enforced.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

STATEMENT OF REASONING INVOLVED IN COURT'S ORDER OF FEBRUARY 11, 2010

The Court issued an order, filed under seal, on February 11, 2010. The Government objects to a request made by certain defendants to unseal that order. The Government asserts that unsealing the order would violate Rule 6(e)(6) of the Federal Rules of Criminal Procedure, which governs grand jury proceedings. The Government adds, however, that "the Court is fully aware of its legal reasoning and is at liberty to draw upon and even share its reasoning in the context of the civil dispute." The Court does so here.

BACKGROUND

Shortly after the civil cases were transferred to this district for multidistrict proceedings, the Department of Justice sought to intervene in the MDL for the purpose of seeking to limit discovery in the civil actions. By order filed July 10, 2007, the Court permitted the DOJ to intervene. The DOJ then moved to stay civil discovery on two grounds. First, the DOJ asserted that because civil discovery is broader than criminal discovery, there was the risk that parties in the civil action would be able to discover sensitive information about the grand jury investigation through civil discovery. Second, the DOJ argued that if civil discovery proceeded in tandem with the grand jury proceedings, employees of the companies under investigation could be placed in the untenable position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inference that comes with that decision, or testifying in a civil deposition and running the risk of self-incrimination in the criminal matter. The Court granted the DOJ's motion to stay discovery until May 2008, but permitted certain limited categories of non-grand jury discovery to proceed. The stay order permitted the DOJ to review but not copy all discovery produced by a party. Docket No. 306 in M 07-1827 SI. In May 2008, the stay order was revised to permit certification discovery.

The parties in the MDL negotiated a protective order to preserve the confidentiality of the documents produced pursuant to civil discovery. The December 10, 2007 stipulated protective order provides that the parties may use civil discovery materials "only in connection with this [civil] action for prosecuting,

defending, or attempting to settle this action." In 2009, the DOJ sought to modify the September 2007 stay order to allow the DOJ to copy, and not just review, all documents produced in the MDL. The Court initially granted the motion, but in response to concerns raised by defendants, referred the parties to the Special Master to explore modifications to the discovery plan. After briefing and a hearing, the Special Master recommended that DOJ be permitted to review all civil discovery, but prohibited from making any copies of the overseas discovery, including deposition transcripts, of the unindicted defendants. The Special Master found that the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits. The Special Master stated that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power," and she noted that the foreign defendants had "vociferously argued against producing either their documents or their employees into this country during this entire litigation." Report & Recommendation Re: Toshiba Entities' Motion for Modifications to the Discovery Schedule and Plan at 2:25-26 (emphasis added). The Special Master found that "those defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safe-guarded, so that the government does not overstep its power, intentionally or otherwise." *Id.* at 3. The Special Master was also concerned that any criminal indictments that flowed from the grand jury's review of overseas documents produced in the civil matter could be subject to challenge. This Court adopted the Special Master's

R & R in an order filed October 20, 2009. That order provided that "the United States shall be limited to reviewing access only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, as well as the other non-indicted foreign defendant (such as . . . Hannstar Display Corporation)."

DISCUSSION

The central question considered in the February 11, 2010 order was whether a grand jury may subpoena foreign-based documents that would otherwise be outside the geographic scope of its subpoena power, but that are located in the United States by virtue of the civil discovery in a related MDL proceeding. The documents in question might otherwise be obtained by (1) letters rogatory, (2) requests made under executive agreements or treaties, such as mutual legal assistance treaties, and (3) informal means.

The Court considered *In Re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995), to determine whether the grand jury might have the authority to subpoena such foreign documents. In *Meserve*, the Ninth Circuit established a *per se* rule that protective orders cannot shield discovery from grand jury subpoenas, and the court held that a criminal grand jury could subpoena documents that were subject to a protective order in a closed civil case. *Id.* at 1226. While there is broad language in *Meserve* regarding the power of the grand jury, *Meserve* did not address the grand jury's authority to subpoena foreign evidence that would otherwise be outside its subpoena power, or the interplay between criminal grand jury proceedings and ongoing civil proceedings involving unindicted

foreign defendants. It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery. Ordinarily a grand jury would be required to obtain foreign material through letters rogatory or other methods. The Court did not find precedent in the case law, and was dubious about establishing such precedent, to permit grand juries to obtain foreign discovery for criminal grand jury proceedings when that evidence is present in the United States only as a result of related civil actions.

The Court felt it possible that such actions might ultimately jeopardize the criminal proceedings. The Court therefore found it is prudent allow the appellate process to establish such precedent if appropriate.

Dated: March 29, 2010

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

ORDER DENYING UNITED STATES' OBJECTIONS TO SPECIAL MASTER'S AUGUST 24, 2009 REPORT AND RECOMMENDATION; ADOPTING REPORT AND RECOMMENDATION

On October 9, 2009, the Court heard argument on the United States' objections to the Special Master's August 24, 2009 Report and Recommendation Re: Toshiba Entities' Motion for Modifications to the Discovery Schedule and Plan. The Court DENIES the United States' objections and hereby ADOPTS the Report and Recommendation. As set forth in the Report and Recommendation, the United States shall be limited to reviewing access only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, as well as the other non-indicted foreign defendants (such as the Chi Mei defendants and

Hannstar Display Corporation). In accordance with the Report and Recommendation, Toshiba and AUO are ordered to immediately produce the overdue foreign discovery and proceed with depositions as anticipated.

The Toshiba entities also seek an order prohibiting the Department of Justice from issuing subpoenas for the foreign documents. The Court DENIES that request. If and when the DOJ seeks to enforce existing subpoenas, or issues new subpoenas seeking the foreign documents, the matter will then be ripe for decision. Alternatively, the Toshiba entities seek a stay on foreign discovery. The Court DENIES that request because a stay would be unfair to the civil plaintiffs whose discovery from Toshiba has already been delayed for over a year.

Accordingly, the Court DENIES the DOJ's objections (Docket No. 1258) and ADOPTS the Report and Recommendation (Docket No. 1223). The Court also GRANTS the Toshiba Entities' motion for leave to file a response to the direct purchasers plaintiffs' response, and that response shall be considered part of the record. (Docket No. 1315).

IT IS SO ORDERED.

Dated: October 20, 2009

SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

Master File No. M07-1827 SI
MDL No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Document Relates to:
ALL ACTIONS

REPORT & RECOMMENDATION RE:
TOSHIBA ENTITIES MOTION FOR
MODIFICATIONS TO THE DISCOVERY
SCHEDULE AND PLAN

On June 19, 2009, the District Court heard argument on the United States' motion to modify the Court's September 25, 2007 Order by permitting the DOJ Antitrust Division to receive copies of all discovery in this civil matter, including deposition transcripts. The Court's earlier order had permitted the DOJ to review but not copy that discovery. Civil Defendants Toshiba and AUO were the only parties to oppose the motion.

After briefing and oral argument, the Court granted DOJ's motion, finding that "the DOJ does not seek to compel foreign discovery that would otherwise be outside the grand jury's subpoena power, but instead

seeks copies of evidence brought into the United States as part of discovery in this case." (See Court's Order of June 24, 2009.) The Court then stated that "it may be appropriate to explore modifications to the discovery schedule and plan," referring such matter to the undersigned. Toshiba responded by filing a letter brief before the Special Master on July 15, 2009, to which AOU joined but made no separate arguments.

The relief asked for was a stay of production of the Toshiba Entities' overseas documents and the merits depositions of their overseas employees.

Both direct and indirect Plaintiffs filed oppositions. Because the Special Master believed that Toshiba had raised a colorable argument, not specifically addressed by the Court's June 24 Order, an in-person hearing was held on August 12, 2009, before the Special Master, to which the DOJ was requested to appear. The DOJ appeared at the hearing and also filed a follow-up letter brief on August 17, which has been read and considered. (The issue of whether the DOJ should have been served with the Toshiba motion is not material and need not be addressed.)

The critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power. The Special Master is cognizant that Judge Illston's conclusion in her June 24 Order appears to answer that question in the negative, and it is not within my authority or my intent to countermand her findings. My recommendations are offered for her consideration only. There is reason to believe, however, that there are distinctions to be made in this specific

instance that were neither addressed in the authorities cited, nor argued to the court.

It is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings. The authorities for that were cited and well argued in the DOJ's June 19 Motion and need not be set forth again. The DOJ is also correct in its argument that once foreign companies and individuals "choose to avail themselves of United States' courts and bring evidence from overseas into the United States, the grand jury is entitled to subpoena it." (US Reply to AUO and Toshiba's Opposition to US Motion to Modify the Court's September 25, 2007 Order).

The problem here is that Defendants did not "choose to avail themselves" of the US courts or voluntarily "bring evidence from overseas into the United States." Rather they were hauled, kicking and screaming, into our courts and have vociferously argued against producing either their documents or their employees into this country during this entire litigation. That resistance has been difficult for Plaintiffs and for the Court, and has resulted in expensive and time-consuming discovery disputes. Colorable arguments can and are made that, having put their products into the American stream of commerce and having made significant profits from so doing, resisting civil litigation over those products in our courts is unjustified and an abuse of our judicial system. Be that as it may, those defendants are still guaranteed certain protections regarding criminal proceedings and those protections must be safeguarded, so that the government does not overstep its power, intentionally or otherwise.

At the same time, Plaintiffs in this civil litigation have been significantly delayed in seeking resolution of their claims, primarily due to issues related to the parallel government investigation. To re-impose a further stay on discovery at this late stage seems unfair to them. The question then is whether there is some procedure that is reasonably responsive to the positions of all sides.

Because this issue arises out of the governments June motion to modify, it is useful to look at the reasons for its request. The government already had the right to review, but not copy, all discovery in this matter. The only argument it gives for needing actual copies is one of convenience. i.e. that "the large amount of discovery, including over 100 deposition transcripts, will make in-person review of these materials at an off-site location impractical and inefficient" and that it "would be less burdensome for the DOJ to make copies of the documents and review them in its own office." Although true, we are considering now only a small sub-set of that discovery, i.e. foreign documents of unindicted Defendants Toshiba and AUO that are brought into the United States by court order and deposition transcripts of foreign national employees from those same defendants. Other than inconvenience, the government has cited no prejudice to its interests from the earlier procedure of limited access. Nor is there any prejudice to Plaintiffs from maintaining that earlier status. Finally, as long as copies of its foreign discovery are not available for presentation to the grand jury, the prejudice to defendants, if any, appears minimal.

For the reasons stated, the Special Master recommends that the Court modify its Order of June 24, 2009, to limit the United States to reviewing access

only, without the right to copy foreign documents and deposition transcripts of foreign national employees of the Toshiba Entities and AUO, brought into the United States under court order in this civil litigation. A protective order should also issue, protecting this limitation from production by other parties. (Information about Toshiba and/or AUO contained in documents and depositions of other parties would not be covered by this order.) It should be noted that the DOJ argued at the hearing that it could then subpoena the subject documents and that its subpoena power would "trump" any Protective Order issued by this court. That issue is not ripe for decision at this time.

Once the Court has ruled on this Report and Recommendation, Toshiba and AUO should immediately produce the overdue foreign discovery and proceed with depositions as anticipated. As always, should the Court have any questions, I am available to respond further.

Respectfully submitted,

HON. FERN M. SMITH (RET.)
HON. FERN M. SMITH (RET.)
SPECIAL MASTER

DATED: AUGUST 24, 2009

[PROPOSED] ORDER

Good cause appearing, the Court hereby adopts the Special Master's Report and Recommendation.

_____

DATED: _____
HON. SUSAN ILLSTON
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. M 07-1827 SI
MDL. No. 1827

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

This Order Relates to:
ALL CASES

ORDER GRANTING UNITED STATES'
MOTION TO MODIFY THE COURT'S
SEPTEMBER 25, 2007 ORDER

On June 19, 2009, the Court heard argument on the United States' motion to modify the Court's September 25, 2007 Order Granting United States' Motion to Stay Discovery. (Docket No. 990). The September 25, 2007 order permits the Department of Justice, Antitrust Division to review all discovery in this matter. DOJ seeks to modify the order to permit DOJ receive copies of all discovery in this matter, including deposition transcripts.

The motion is unopposed by plaintiffs and all defendants except the AUO and Toshiba defendants. The Court does not find appropriate AUO's proposal to allow questioning of deponents regarding the grand jury proceedings or the witnesses' testimony.

As the government notes, witnesses may voluntarily disclose information about the grand jury proceedings and their testimony, and the current limitations only prohibit attorneys from compelling testimony in a deposition.

The Court is also not persuaded by the objections raised by Toshiba, and finds that the DOJ should be permitted to receive copies of the documents and transcripts in these proceedings. *Cf. In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1224-26 (9th Cir. 1995). The DOJ does not seek to compel foreign discovery that would otherwise be outside the grand jury's subpoena power, but instead seeks copies of evidence brought into the United States as part of discovery in this case. As discussed at the June 19, 2009 hearing, it may be appropriate to explore modifications to the discovery schedule and plan, and if the Toshiba defendants (or any other parties) wish to do so, they should meet and confer and discuss the matter with Judge Smith.

IT IS SO ORDERED.

Dated: June 24, 2009

SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge